

Restricting Social Graces: The Implications of Social Media for Restrictive Covenants in Employment Contracts

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I. INTRODUCTION

The social media revolution is upon us.¹ Hundreds of millions of individuals worldwide use social media websites to foster online relationships with friends, family and acquaintances the world over.² Facebook, by far the largest social media outlet, has over 450 million users.³ Twitter's 175 million users post ninety-five million messages, or "tweets," every twenty-four hours.⁴ LinkedIn, a professional networking website, boasts over 135 million users.⁵ Given the sheer size and rapid growth of social media, the law must adapt in myriad arenas to pay deference to all the interaction now occurring through social media channels. The landscapes of criminal law, family law, advertising law, privacy law, intellectual property law, constitutional law, the law of evidence, and many other areas have already been altered by social media.⁶ The law governing restrictive covenants in employment contracts, however, is one area for which the implications of social media are undetermined for departed employees who are bound by restrictive covenants.

In the age of social media, employees everywhere are forging online relationships with customers, clients, and colleagues.⁷ Restrictive covenants in employment contracts give employers protection against customer/colleague-solicitation and competition on the part of departing employees.⁸ Nonetheless, and surprisingly, no American court or commentator has addressed the issue of

¹ This Note will focus on three of the largest social networking websites (social media): Facebook (facebook.com), LinkedIn (linkedin.com), and Twitter (twitter.com). This is not meant to discount the fact that there are enumerable other social networking websites in existence, and their number promises to grow larger still in the future.

² See Stephen P. Rosenberg, *Facing Up to Facebook: Social Networking Sites and the Workplace*, CONN. LAW., Apr. 2009, at 16, 17. From 2005 to 2009, the number of Internet users with profiles on social media websites increased from 8% to 35%. *Id.* In 2009, 75% of Internet users between the ages of eighteen and twenty-four, and 57% of Internet users between the ages of twenty-five and thirty-four, had profiles on social media websites. *Id.*

³ Randy L. Dryer, *Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, YouTube, & Wikis*, UTAH B.J., May/June 2010, at 16, 16.

⁴ *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Mar. 2, 2011).

⁵ *About Us*, LINKEDIN PRESS CENTER, <http://press.linkedin.com/about> (last visited Nov. 6, 2011).

⁶ See Dryer, *supra* note 3, at 16–19; Kendall Kelly Hayden, *The Proof Is in the Posting: How Social Media Is Changing the Law*, 73 TEX. B.J. 188, 189–91 (2010).

⁷ See, e.g., Frederic D. Stutzman & Woodrow N. Hartzog, *Boundary Regulation in Social Media* 3 (Oct. 8, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566904 ("Whereas social media was once primarily the domain of the friend group, it is now common for users to interact with other social groups such as family members, coworkers, and past contacts.").

⁸ JOHN JUDE MORAN, *EMPLOYMENT LAW: NEW CHALLENGES IN THE BUSINESS ENVIRONMENT* 1 (5th ed. 2011); MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 1005 (6th ed. 2007).

an employer alleging that a former employee has violated a restrictive covenant through conduct on a social media website.⁹ Thus, while the courts have yet to address the precise impact of social media on restrictive covenants, this area of law will be forced to address such impact in coming years. In the interim, discerning the sensible and likely implications of social media for restrictive covenants is a worthy pursuit for several groups. Employers are desirous of structuring their restrictive covenants to best protect their interests in the social media age; employees should seek to be informed of what social media conduct is likely to violate the restrictive covenants that bind them; and lawyers should be cognizant of social media's impact so as to dutifully counsel clients from both of the aforementioned groups.

Part II of this Note will lay out the general principles that govern the law on the enforcement of restrictive covenants. An understanding of the guiding principles of this area of law will aid the determination of how social media conduct is likely to affect restrictive covenants. Part III will then provide a brief summary of the characteristics of the main social media forums. The novel issues posed by social media are impossible to grasp without at least a cursory overview of how exactly former employees contact clients, customers, and colleagues via social media outlets. Part IV will examine the ways in which social media conduct is likely to fit into the law governing restrictive covenants and, in so doing, provide solutions to employees and employers seeking to understand the contours of conduct permissible under the restrictive covenants in their employment contracts. Specifically, the endeavor will confront and answer the difficult questions posed by the modalities of communication unique to social media. Because this is an area of law yet to be developed, analogies will be drawn from existing principles in order to discern their import vis-à-vis social media. Finally, Part V will provide advice to employees and employers, in view of the conclusions reached in Part IV, as to how best adhere to the restrictive covenants that bind and protect them respectively in the social media age.

II. THE LAW GOVERNING RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS

Employers frequently include restrictive covenants in employment contracts (or make separate restrictive agreements) to ensure employees do not compete with the employer, solicit its clients, or divulge proprietary information after departing.¹⁰ Restrictive covenants usually embody one or more of four employer-protective elements: (1) general non-competition; (2) non-disclosure;

⁹ Lawrence J. Del Rossi & Joshua D. Rinschler, *Social Networking and Restrictive Covenants*, LAW360 (Mar. 16, 2010), <http://www.drinkerbiddle.com/publications/Detail.aspx?pub=2083>.

¹⁰ MORAN, *supra* note 8, at 1; ROTHSTEIN & LIEBMAN, *supra* note 8, at 1005.

(3) customer non-solicitation; and (4) employee non-solicitation.¹¹ While the information contained in this Note may be applicable to multiple forms of restrictive covenants, the latter two forms will be those most fully treated. This is because non-solicitation agreements pose the most challenging questions for the law's adaptation to social media. Further, while non-solicitation agreements remain substantially enforceable,¹² covenants not to compete are widely subject to dubious enforceability.¹³ Non-solicitation agreements are utilized to prevent a former employee from soliciting the customers and employees of the former employer.¹⁴

The enforceability of restrictive covenants depends on a balancing of competing interests.¹⁵ Employers have an interest in protecting their client list and employee roles against solicitation by former employees.¹⁶ This employer interest is warranted given that employers frequently exhaust time and money to

¹¹ Kenneth J. Vanko, "You're Fired! And Don't Forget Your Non-Compete . . .": *The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 2 (2002).

¹² *Id.* at 7 ("[N]on-solicitation covenants have met with relatively little judicial resistance . . .").

¹³ See, e.g., MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 491 (1994) ("Several states have taken the position that employee covenants not to compete are against public policy. Modern courts disfavor these covenants and scrutinize the terms . . . in the rare instances that covenants are deemed enforceable."). Indeed, a few states reject enforcement of non-compete agreements altogether. See, e.g., CAL. BUS. & PROF. CODE § 16600 (West 2007) ("[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."). Note that this language prohibits non-compete agreements, but *not* non-solicitation agreements. This is because the latter do not prevent an employee from working for a competitor, or from pursuing a livelihood, but merely prohibit the pirating of a former employee's clients and employees. Vanko, *supra* note 11, at 6–7. Finally, due to the global market place that has been facilitated by e-commerce and Internet marketing and communications, even where covenants not to compete do exist they often utilize a form of non-solicitation provision in lieu of the traditional geographic limitation on competition. ROTHSTEIN ET AL., *supra* at 497 ("Increasingly, customer restrictions are used to complement or substitute for geographic restrictions."); Chiara F. Orsini, *Protecting an Employer's Human Capital: Covenants Not to Compete and the Changing Business Environment*, 62 U. PITT. L. REV. 175, 179 (2000) (noting that as technology increases the ability to conduct business over a wide area and with a broad customer base, many employers have replaced the geographic restraint formerly typical in non-compete agreements with non-solicitation provisions).

¹⁴ For example, Estée Lauder's standard non-solicitation provision provides that the employee will "not, directly or indirectly, solicit, induce, recruit, or encourage any of the Company's employees to terminate their employment with the Company or to perform services for any other business." *Estée Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 162 (S.D.N.Y. 2006).

¹⁵ ROTHSTEIN ET AL., *supra* note 13, at 490.

¹⁶ *Id.*

enable employees to forge connections with customers and colleagues alike.¹⁷ Restrictive covenants, then, serve to prevent employers' investments from being used against them by former employees.¹⁸ Conversely, employees have an interest in pursuing a livelihood, deriving satisfaction from work, and engaging in innocuous contact with former colleagues and customers with whom they have built relationships.¹⁹ These former colleagues and customers likewise have an interest in maintaining such relationships. Finally, the general public has an interest in free and open communication and competition amongst product and service providers.²⁰

Out of deference to the latter three interests, courts construe restrictive covenants against the employer.²¹ Further, courts will not enforce restrictive covenants that are unduly harsh or more restrictive than necessary to protect the employer's business interests.²² Moreover, restrictive covenants will be enforced only to the extent that the restrictions imposed on an employee are reasonably necessary to protect the employer's legitimate business interests.²³ Thus, courts will typically enforce a restrictive covenant only if several factors are met: (1) the covenant protects a legitimate employer interest;²⁴ (2) the

¹⁷ ROTHSTEIN & LIEBMAN, *supra* note 8, at 1005; *see also* Vanko, *supra* note 11, at 7 (noting that courts consistently hold that it is reasonable for an employer to protect its investment in training its staff and maintaining a competent workforce).

¹⁸ ROTHSTEIN & LIEBMAN, *supra* note 8, at 1005.

¹⁹ ROTHSTEIN ET AL., *supra* note 13, at 490.

²⁰ *Id.*

²¹ *See, e.g.,* Amex Distrib. Co. v. Mascari, 724 P.2d 596, 600 (Ariz. Ct. App. 1986) (noting that restrictive covenants in employment contracts are disfavored and strictly construed against the employer); Idbeis v. Wichita Surgical Specialists, P.A., 112 P.3d 81, 87 (Kan. 2005) (noting that restrictive covenants in employment contracts are strictly construed against the employer); Star Direct, Inc., v. Dal Pra, 767 N.W.2d 898, 905 (Wis. 2009) (noting that restrictive covenants in employment contracts are not to be construed farther than their language requires and are to be construed in favor of the employee); Orsini, *supra* note 13, at 176.

²² MORAN, *supra* note 8, at 6.

²³ UZ Engineered Prods. Co. v. Midwest Motor Supply Co., 770 N.E.2d 1068, 1079 (Ohio Ct. App. 2001) (citing Brentlinger Enters. v. Curran, 752 N.E.2d 994, 998 (Ohio Ct. App. 2001)); *see also* Iron Mountain Info. Mgmt. Inc. v. Viewpointe Archive Servs., LLC, 707 F. Supp. 2d 92, 106 (D. Mass. 2010) (quoting Rakestraw v. Lanier, 30 S.E. 735, 738 (Ga. 1898) ("Under Georgia law, a restrictive covenant contained in an employment contract . . . will be upheld 'if the restraint imposed is not unreasonable . . . and is reasonably necessary to protect the interest of the party in whose favor it is imposed'")); *id.* (noting that under Massachusetts law a restrictive covenant is enforceable "provided it is necessary for the protection of the employer" (internal quotation marks omitted)).

²⁴ A finding that a given restrictive covenant protects a legitimate employer interest is a threshold inquiry in any determination of the enforceability of a restrictive covenant. ROTHSTEIN ET AL., *supra* note 13, at 491. Non-solicitation agreements prohibiting departed employees from soliciting former customers are likely to satisfy this threshold inquiry where the employer enabled the employee to develop lasting customer contacts. *See* Vanko, *supra* note 11, at 7 (citing Corson v. Universal Door Sys., Inc., 596 So. 2d 566, 568–69 (Ala. 1991)) (emphasizing importance of employer's role in introducing employee to key

covenant is no broader than necessary to protect such interest;²⁵ (3) the covenant poses no harm to the public interest; and (4) the covenant inflicts no real hardship for the bound employee.²⁶

The current tendency to replace geographical limitations in non-compete covenants with non-solicitation provisions is illustrative of the balancing of interests reflected in the above test. The elimination of geographical limitations serves the interests of both former employees and the public in allowing free mobility of labor, ensuring that skilled employees can gravitate toward their best usefulness.²⁷ The inclusion of non-solicitation provisions serves the employer's interest by prohibiting direct competition from departed employees through the pirating of customers and current employees.²⁸

An additional rule affecting the enforcement of non-solicitation provisions is particularly relevant in the social media context: a former employee does not violate his non-solicitation agreement if customers or clients of his former employer contact or approach him.²⁹ This rule poses intriguing questions for conduct via social media outlets, and likely will even be applied in differing fashions based on the type of social media conduct that takes place.³⁰ This is because when communication occurs through channels unique to social media, it is not immediately clear which party initiated such communication.³¹ That is, it is unclear who is approaching whom. In order to navigate these nuanced issues, a basic understanding of how communication occurs through social media channels is required. It is that undertaking which we turn to next.

customers). Non-solicitation agreements prohibiting departed employees from soliciting former colleagues, by encouraging them to leave their employer, are even more likely to satisfy this threshold inquiry. *See id.* (“[C]ourts have held that it is reasonable for an employer to protect its investment in training its staff and maintaining a competent workforce.”).

²⁵ In the event that an otherwise enforceable restrictive covenant is found to be overbroad, a court is likely to take one of two approaches. The more common approach is to simply find the entire covenant unenforceable; the alternative approach is to “blue-line” the overbroad portion, eliminating it from the covenant and enforcing the remainder. ROTHSTEIN ET AL., *supra* note 13, at 499.

²⁶ *Id.* at 491.

²⁷ *Id.* at 494; *see also* Orsini, *supra* note 13, at 176 (noting that courts have traditionally frowned upon covenants not to compete because they limit employee freedom).

²⁸ Vanko, *supra* note 11, at 6–7.

²⁹ *See, e.g.,* Hunter Grp., Inc. v. Smith, 9 F. App'x 215, 219 (4th Cir. 2001) (“[W]hatever may be the outer limits of a reasonable interpretation of ‘solicit,’ . . . it is clear that the term does not encompass . . . responding to questions and requests regarding [former employee's] new employer initiated by her former colleagues.” (emphasis added)); Prosonic Corp. v. Stafford, 539 F. Supp. 2d 999, 1004 (S.D. Ohio 2008); Coastal Loading, Inc. v. Tile Roof Loading, Inc., 908 So. 2d 609, 613 (Fla. Dist. Ct. App. 2005); Advantage Digital Sys., Inc. v. Digital Imaging Servs., Inc., 870 So. 2d 111, 115 (Fla. Dist. Ct. App. 2003).

³⁰ *See infra* Part IV.

³¹ *See infra* Part IV.

III. THE MECHANICS OF SOCIAL MEDIA COMMUNICATION

“Social media is word of mouth on steroids.”³² Social media outlets are an online environment where users can publish information about themselves. Once a member of a given social media site, a user then has the ability to “connect” with other users. Forming connections with other users affords them the opportunity to view the user’s published information, which can include biographical material, photos, current and previous employment information, education, contact information, and even a list of that user’s other connections.³³ Employers who encourage their employees to use social media for advertising, marketing, and establishing relationships with customers and colleagues would do well to be wary of the staggering information-sharing capacity of social media sites. Social media enables users to affect instantaneous communication to scores of their connections across the globe with tremendous ease, at little or no cost, and with the ability to add and delete information with virtual impunity.³⁴ The opportunity for employees to clandestinely violate non-solicitation agreements manifests itself. Nevertheless, whether conduct via social media violates a restrictive covenant may well turn on the nuances of the particular social media outlet in question. The following is a summary of the characteristics of three main outlets: Facebook, LinkedIn, and Twitter.

A. Facebook

Facebook is the premiere social networking site.³⁵ Users start by creating a “profile” on which they can publish personal information, professional information, educational information, photos, videos, thoughts, and comments.³⁶ Users then make “friends”³⁷ by submitting “friend requests” to

³² Dryer, *supra* note 3, at 16.

³³ Del Rossi & Rinschler, *supra* note 9, at 2.

³⁴ *Id.* But see Erin L. Gouckenour, *Social Networking and the Workforce: Blurring the Line Between Public and Private Spheres*, VA. B. ASS’N NEWS J., Winter 2009/2010, at 8, 9 (noting that deleted information is never truly deleted from the Internet, and may be recovered through powerful search engines, such as Google, that maintain searchable archives).

³⁵ The information sharing capacity of Facebook cannot be overstated. “It is the [single] largest phenomenon of human connection in history.” Logan Kugler, *The Paranoid’s Guide to Facebook*, PC WORLD, Feb. 2011, at 33, available at http://www.pcworld.com/article/210859/the_paranoids_guide_to_facebook.html. Over half of Facebook’s users log onto the site in any given day. *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Mar. 5, 2011). The average user boasts 130 “friends” and users spend over 700 billion minutes monthly on the site. *Id.*

³⁶ Khe Foon Hew, *Students’ and Teachers’ Use of Facebook*, 27 COMPUTERS HUM. BEHAV. 662, 663 (2011); Rosenberg, *supra* note 2, at 17.

³⁷ As used in this Note, “friend” refers to a user’s Facebook connections, and not to its colloquial meaning.

other Facebook users who can then establish the connection by accepting the request.³⁸ Once a connection (“friendship”) has been established, a user may publish comments, photos and videos on the profiles of their friends and vice versa.³⁹ Information published on a user’s profile (be it by the user himself or a friend) is publically viewable to all Facebook users by default.⁴⁰ However, Facebook features detailed privacy settings, through which users may restrict published information to be viewable by their friends only, or restricted even further to be viewable only by a tailored subset of their friends.⁴¹ In addition to updating profile information which is viewable generally by a user’s friends, a Facebook user may choose to send a “message” to a selected friend or list of friends.⁴² This feature is identical in function to sending an e-mail.⁴³ Facebook also boasts “facebook chat” which allows users to instantly message friends who are currently logged-in and can then respond in real time. Facebook has a casual and personal tone which, from a business perspective, can enhance an employee-user’s likeability factor, which in turn can aid in client development.⁴⁴

For the purposes of this Note, the most interesting feature of Facebook is the “news feed.” Upon logging into Facebook, users are directed first to their Facebook homepage, which has the news feed as its prominent component.⁴⁵ The news feed inundates users with updates that have recently occurred on the profiles of their friends.⁴⁶ These updates may include changes to a friend’s profile information, a new photo or video that a friend has added, and new statuses or comments posted by friends to their profile, among many others.⁴⁷ Similarly, when a user changes or adds to his own Facebook information, those changes may be visible not only on his profile but also appear on the news feeds of his friends. However, the news feed does *not* display every single update by

³⁸ Gina Furia Rubel, *Social Media and the Benefits to Lawyers of Adopting a Policy*, 81 PA. B. ASS’N Q. 47, 52 (2010); Hew, *supra* note 36, at 663; Rosenberg, *supra* note 2, at 17.

³⁹ Hew, *supra* note 36, at 663; Rosenberg, *supra* note 2, at 17.

⁴⁰ Debra L. Bruce, *Social Media 101 for Lawyers*, 73 TEX. B.J. 186, 186 (2010); Kugler, *supra* note 35, at 33.

⁴¹ Furia Rubel, *supra* note 38, at 52; Hew, *supra* note 36, at 666; Kugler, *supra* note 35, at 33; Rosenberg, *supra* note 2, at 17. Facebook provides information on its privacy settings in the Help Center of its website which can be accessed at *Privacy*, FACEBOOK HELP CENTER, <http://www.facebook.com/help/?page=419> (last visited Nov. 6, 2011).

⁴² Hew, *supra* note 36, at 663.

⁴³ *Id.*; see also *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 981–82 (C.D. Cal. 2010) (noting that there is no basis for distinguishing between Facebook’s messaging service and traditional web-based email).

⁴⁴ Bruce, *supra* note 40, at 186.

⁴⁵ James Grimmelmenn, *Saving Facebook*, 94 IOWA L. REV. 1137, 1146 (2009); Yasamine Hashemi, Note, *Facebook’s Privacy Policy and Its Third-Party Partnerships: Lucrativity and Liability*, 15 B.U. J. SCI. & TECH. L. 140, 142 (2009).

⁴⁶ Grimmelmenn, *supra* note 45, at 1146; Hashemi, *supra* note 45, at 142.

⁴⁷ Grimmelmenn, *supra* note 45, at 1146; Hashemi, *supra* note 45, at 142.

each and all of the user's friends.⁴⁸ With many users boasting hundreds or even thousands of friends, the deluge of a user's friends' updates must be circumscribed.

Facebook achieves this tailoring through the utilization of a routing algorithm called "EdgeRank."⁴⁹ EdgeRank serves to determine which updates will appear on a user's news feed by selecting the updates of a user's friends that are most relevant to that user. Among the variables affecting which friends will have a user's updates appear on their news feed are an affinity score between the user and the given friend and a time decay factor based on the time elapsed since the given update was posted.⁵⁰ When a user updates his Facebook profile, he can be confident that the update will appear on the news feeds of *some* of his friends. However, the crucial consequence of the EdgeRank news feed system is that he cannot know for certain *which* of his friends will have that update appear on their news feed the moment they log in to Facebook.⁵¹

If a user's update does appear on a given friend's news feed, that friend will be able to view the update merely by logging into Facebook.⁵² However, if the user's update is not selected by EdgeRank to appear on a given friend's news feed, that friend would have to actively search for the user's profile in order to view the update. Because users cannot control EdgeRank, they update their Facebook profiles with no way to know whether or not EdgeRank will publish that update on a given friend's news feed. As will be discussed below in Part IV, the functionality of the Facebook news feed system poses intriguing questions in discerning whether a former employee communicated information offensive to a restrictive covenant to a restricted party,⁵³ or whether, conversely, that restricted party sought the information out from the former employee. Who approached whom? This distinction is critical because of the definition of solicitation discussed earlier in Part II,⁵⁴ which encompasses the former situation but does not reach the latter.

⁴⁸ Michael Bernstein, *Narrowcasting and the Facebook News Feed*, HAYSTACK BLOG (July 26, 2010), <http://groups.csail.mit.edu/haystack/blog/2010/07/26/narrowcasting-and-the-facebook-news-feed/>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ A user can gain some control over which of his friends will see a given update by creating segregated groups within Facebook's privacy settings. If the user chooses to "share" or publish a given update with only a certain segregated group, then only friends who are members of that group can have the update appear on their news feed. *Sharing and Finding You on Facebook*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info-on-fb> (last visited Nov. 6, 2011).

⁵² Grimmelmann, *supra* note 45, at 1146; Hashemi, *supra* note 45, at 142.

⁵³ As used in this Note, "restricted party" is used to indicate a party whom an employee bound by a non-solicitation agreement is prohibited from soliciting, i.e., former colleagues or customers, as the case may be.

⁵⁴ See *supra* p. 885.

However, a Facebook user is not bereft of tools to control which of his friends receives his updates on their news feeds.⁵⁵ By tailoring Facebook's privacy settings to restrict which among his friends may view information on his Facebook profile, a user can exert control over which parties will receive information he posts to Facebook.⁵⁶ Thus, a Facebook user wary of the receipt of solicitous information by a restricted party with whom he is Facebook friends can ensure that such restricted party cannot view the given information. This is accomplished by limiting the class who has access to a given segment of the user's Facebook information to exclude the restricted party.⁵⁷

B. LinkedIn

LinkedIn is a massive social media website, unique for its professional orientation.⁵⁸ LinkedIn is similar to Facebook in that individuals create an account, produce a LinkedIn profile, and then "connect" with other LinkedIn users, enabling them to see the user's profile information. LinkedIn differs from Facebook in that its users tend to be more professionally focused than Facebook users.⁵⁹ Indeed, LinkedIn advertises itself as a professional networking website designed to foster connections with colleagues, employers, potential employers, and other professional contacts.⁶⁰

"A LinkedIn profile looks like a resume on steroids."⁶¹ A typical LinkedIn profile provides less room for user's personal information, comments, and photos while highlighting a user's educational information, employment history, and professional qualifications. Like Facebook, a LinkedIn user can also post a "status" on his profile, to convey messages or thoughts to connections who view his profile.⁶² LinkedIn provides users with networking capabilities unparalleled prior to the social media age. As the website itself explains, a user's network consists of "your connections, your connections' connections, and the people they know, linking you to a vast number of qualified professionals and experts."⁶³

⁵⁵ See *supra* notes 41, 51 and accompanying text.

⁵⁶ See *supra* notes 41, 51 and accompanying text.

⁵⁷ See *supra* notes 41, 51 and accompanying text.

⁵⁸ Like Facebook, LinkedIn is an incredibly powerful platform for communication. LinkedIn gains a new member every second, acquiring an additional one million users every twelve days. *About Us*, LINKEDIN PRESS CENTER, <http://press.linkedin.com/about> (last visited Feb. 2, 2011). In 2010 alone, LinkedIn users affected nearly two billion searches for information on other professionals using the website. *Id.*

⁵⁹ Bruce, *supra* note 40, at 186.

⁶⁰ *About Us*, LINKEDIN PRESS CENTER, *supra* note 5.

⁶¹ Bruce, *supra* note 40, at 186; see also Furia Rubel, *supra* note 38, at 50 (noting that LinkedIn serves as an online resume or curriculum vitae for its users).

⁶² Furia Rubel, *supra* note 38, at 50.

⁶³ Del Rossi & Rinschler, *supra* note 9, at 2.

Like Facebook, a user's LinkedIn homepage informs the user when his connections update their profiles or statuses.⁶⁴ Similarly, a user's connections receive updates on their homepages whenever a user updates his profile or status.⁶⁵ Thus, a user's connections will be informed via automatic update whenever the user changes his job status or education status, comments on his current position, or otherwise updates his LinkedIn profile.⁶⁶ This means that when a user alters his LinkedIn profile, the changes will be communicated to all of his connections the next time they log in.

However, LinkedIn, like Facebook, offers users the ability to utilize privacy settings to regulate both the updates they receive from connections,⁶⁷ and the updates their connections receive from them.⁶⁸ Thus, a LinkedIn user may tailor his account settings to exercise specific control over which, if any, of his connections will receive updates when he alters his profile.⁶⁹ Connections not receiving such updates can only become otherwise aware of the alterations by taking the initiative to seek out the user's profile. Thus, a LinkedIn user who posts information to his profile thereby communicates that information to all of his connections; they will receive an update on the posting upon logging in. However, by making use of LinkedIn's privacy settings, the user can cut off the flow of updates to his connections, ensuring that the only way they will receive information about the user is by actively searching out his profile.

C. Twitter

Twitter operates in a slightly different format than Facebook and LinkedIn. Twitter is the world's most popular "micro-blog," a platform that enables users to exchange small elements of content such as text, single images, or links to videos and other media.⁷⁰ Once a user creates a Twitter account, he cannot publish substantial personal or professional information.⁷¹ Twitter does not feature a profile for each user as do Facebook and LinkedIn.⁷² Beyond being able to post very limited personal information, a Twitter user interacts with the online Twitter community by posting small posts, or "tweets," to his Twitter page.⁷³ A tweet cannot exceed 140 characters.⁷⁴ Twitter is thus commonly

⁶⁴ Chris Richman, *Announce Your Status to Your Professional Network*, LINKEDIN BLOG (Feb. 28, 2008), <http://blog.linkedin.com/2008/02/28/whats-new-at-li/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Settings & Personalization*, LINKEDIN LEARNING CENTER, <http://learn.linkedin.com/settings/> (last visited Nov. 6, 2011).

⁶⁹ *Id.*

⁷⁰ Andreas M. Kaplan & Michael Haenlein, *The Early Bird Catches the News: Nine Things You Should Know About Micro-Blogging*, 54 BUS. HORIZONS 105, 106 (2011).

⁷¹ See Bruce, *supra* note 40, at 186.

⁷² *Id.*

⁷³ Furia Rubel, *supra* note 38, at 53.

referred to as “micro-blogging.”⁷⁵ Users can choose to “follow” the tweets of particular users or run a search for a word, phrase, or username.⁷⁶ Like Facebook and LinkedIn, then, the way in which a user’s information is received by other users depends on whether or not those other users have a connection with the first user on Twitter.

A Twitter connection is formed when one user “follows” another.⁷⁷ When a user posts a tweet, all the users who have signed up to follow that user will be notified.⁷⁸ Thus, when a user posts a tweet, he does so with the understanding that the information contained in the tweet will reach his followers. Even users who are not followers, however, may access the information contained in a user’s tweets by running a search. Further, even individuals who do not have a Twitter account may access the website and perform searches.⁷⁹ A search for a word or phrase will return tweets containing that word or phrase.⁸⁰ Similarly, a search for the username of a Twitter user will enable the searcher to access that user’s Twitter page and to view all recent tweets.⁸¹

Like the Facebook news feed, the process of “tweeting” and “following” has implications for whether former employee-users provided information to a restricted party, or whether a restricted party sought out the information from the former employee. Who approached whom? This distinction will in turn prove critical in assessing whether a given instance of Twitter conduct is purely innocuous, or whether instead is solicitation violative of a restrictive covenant.⁸² Also like Facebook, however, a Twitter user can take advantage of privacy settings to restrict the class of those able to receive information posted on Twitter.⁸³ Twitter accounts can be locked to allow the user to control who is able to see and receive his tweets, limiting access to approved connections only.⁸⁴ Through the utilization of such privacy settings, a Twitter user who is

⁷⁴ Bruce, *supra* note 40, at 186; Furia Rubel, *supra* note 38, at 53; Kaplan & Haenlein, *supra* note 70, at 106. Despite relegating users to posts of a maximum of 140 characters per “tweet,” Twitter has become an incredibly powerful communicative force. Twitter’s appeal has been attributed, at least in part, to three factors: the user desire for ambient awareness, the allure of the “push-push-pull” communication derived from “following” a Twitter user, and the virtual exhibitionism and voyeurism provided to active and passive followers. *Id.* at 106–08.

⁷⁵ Bruce, *supra* note 40, at 186.

⁷⁶ *Id.*; Furia Rubel, *supra* note 38, at 53.

⁷⁷ Kaplan & Haenlein, *supra* note 70, at 107.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Bruce, *supra* note 40, at 186.

⁸¹ See Kaplan & Haenlein, *supra* note 70, at 107.

⁸² See *infra* Part IV.E.

⁸³ Gouckenour, *supra* note 34, at 9.

⁸⁴ *Id.* Gouckenour points out, however, that the “privacy” offered by Twitter may be illusory in many instances. See *id.*

[I]f one of those approved connections “retweets” something posted by the private user, that private user’s name is now public and connected with the original post.

bound by a restrictive covenant can help to ensure that otherwise solicitous information posted on his Twitter account is not accessible by a restricted party.

This Note has discussed the general rules and principles governing existing law on the enforcement of restrictive covenants with respect to conduct through traditional channels of communication. This Note has also engaged in an overview of the novel ways in which users of social media may share information with other users via social media outlets. What remains is to apply the rules and principles of existing restrictive covenant law to these new modes of communication. This pursuit will shed light on the place of social media in restrictive covenant law and enable employers, employees, and the public alike to gain insight into how the law can be expected to address social media in the restrictive covenant context. It is only with such understanding that employers and employees can determine measures necessary to protect their interests vis-à-vis the restrictive covenants that respectively protect and bind them.

IV. CONFRONTING THE DIFFICULT QUESTIONS POSED BY SOCIAL MEDIA: ANALOGIZING FROM EXISTING LAW TO DISCERN SOCIAL MEDIA'S PLACE IN RESTRICTIVE COVENANT LAW

Restrictive covenants in employment contracts strike a balance between the legitimate business interests of employers and the ability of former employees to be productively employed elsewhere.⁸⁵ This delicate balance is no less important merely because the conduct that threatens it occurs via social media rather than through traditional channels. Moreover, communications via social media may pose a greater threat because of the ability to share information with

For example, consider the situation in which an employee tweets: 'I hate my boss! Who wants to work on the weekend?!' on a private Twitter account which is traceable to the employee's email address. One of the employee's friends, John, decides he agrees. John can retweet the message, which will include the original poster's username. . . . If John is connected to one of the employee's supervisors on Twitter, or if his profile is unrestricted and anyone can view it, the statement can now be traced back to a private account by someone who may not like the original tweet.

Id. Indeed, Twitter warns users of the prospect of their "tweets" being made public. *Twitter Privacy Policy*, TWITTER, <http://twitter.com/privacy> (last visited Mar. 3, 2011).

Most of the information you provide to us is information you are asking us to make public. This includes not only the messages you Tweet and the metadata provided with Tweets, such as when you Tweeted, but also the lists you create, the people you follow, the Tweets you mark as favorites or Retweet and many other bits of information. Our default is almost always to make the information you provide public but we generally give you settings . . . to make the information more private if you want. Your public information is broadly and instantly disseminated.

Id.

⁸⁵ ROTHSTEIN ET AL., *supra* note 13, at 490.

a large number of people instantly.⁸⁶ Therefore, it is reasonable to presume that the rules governing existing cases in the field of restrictive covenants may be utilized to address new concerns regarding social media activity.

To a certain degree, many forms of social media communication pose no novel issues. For example, when Facebook and LinkedIn users send messages to other users, the resulting communication is nearly identical to that which would have been affected if the user had instead communicated via a traditional e-mail.⁸⁷ Nevertheless, as discussed above, social media has introduced some truly novel modalities of communication: the Facebook news feed, the ability to post information to the profiles of Facebook and LinkedIn users, and of course, the tweet.⁸⁸ It is these novel forms of communication which proffer the most captivating issues regarding social media's potential effect on restrictive covenant law.

This section will address these issues by analogizing to existing case law in order to discern how courts are likely to enforce restrictive covenants when the conduct alleged to have violated them is social media conduct. This process in turn will provide solutions to employees, employers, and attorneys alike as these groups seek to structure their restrictive covenants and conduct in a world where communication is increasingly dominated by social media outlets. Discovering solutions to the fascinating questions posed by social media in this arena is crucial for all parties involved. While litigation has yet to provide any answers, it is clear that it will inevitably confront these questions in the coming months.

A. TEKsystems, Inc. v. Hammernick

TEKsystems, Inc. v. Hammernick,⁸⁹ originally filed in March of 2010, was an action to enforce restrictive covenants in an employment contract that was poised to break new ground in the law dealing with social media. *Hammernick* was unique because, for the first time, communication via social media, in this instance LinkedIn, was alleged to be conduct in violation of a restrictive covenant in an employment contract.⁹⁰

TEKsystems provides recruiting and employment services for technical personnel.⁹¹ Those employees who work temporarily for a customer-firm while

⁸⁶ Del Rossi & Rinschler, *supra* note 9, at 5 (“[T]he employer’s chances of getting immediate injunctive relief, and in proving irreparable harm, may be easier to establish when a former employee uses a social network to solicit customers because of the employee’s ability to reach such large numbers of people so quickly.”).

⁸⁷ *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 981–82 (C.D. Cal. 2010); *Hew*, *supra* note 36, at 663.

⁸⁸ See *supra* Part III.A–C.

⁸⁹ Complaint, *TEKsystems, Inc. v. Hammernick*, No. 0:10-cv-00819-PJS-SRN (D. Minn. Mar. 16, 2010), ECF No. 1.

⁹⁰ *Id.* at 10.

⁹¹ *Id.* at 2.

remaining on the TEKsystems payroll are referred to as “contract employees.”⁹² Hammernick signed a non-solicitation agreement that forbade her to “[a]pproach, contact, solicit or induce any person who has been a Contract Employee within the two (2) year period prior to the date of termination”⁹³ Hammernick was alleged to have “connected” with sixteen contract employees in violation of her non-solicitation agreement using her LinkedIn account. Further, TEKsystems acquired evidence of a LinkedIn message sent from Hammernick to contract employee Tom Peterson in which she asked if he was “still looking for opportunities,” and that she “would love to have [him] come visit [her] new office and hear about some of the stuff [they] are working on.”⁹⁴

Although trial was set to be held by April of 2011, *Hammernick* from the outset threatened to raise more questions than it answered. The message to Peterson was clear evidence of solicitation violative of Hammernick’s non-solicitation agreement. Thus, the court was able to dispense with its remedy⁹⁵ without tackling some of the difficult issues raised by the mere “connections” Hammernick forged with contract employees and the attendant implications for the relationship between employment contracts and social media. Although they may escape enumeration, some of the most challenging questions raised are:

- Does merely “connecting” with, “friending,” or “following” a restricted party via a social media website constitute a violation of a restrictive covenant that prohibits solicitation or contact with such individuals?⁹⁶
- Does compliance with non-solicitation covenants require former employees to remove connections or “un-friend” former customers, clients and colleagues until the restrictive period ends?⁹⁷
- What is the effect of information posted on a former employee’s social media profile, visible to former customers, clients, and colleagues along with numerous inoffensive parties?

One issue which future courts will most assuredly deal with is social media’s general place in restrictive covenants. That is, is weight given to the medium, or just the message? The outcome will help employers obtain guidance

⁹² *Id.* at 7.

⁹³ *Id.*

⁹⁴ *Id.* at 10.

⁹⁵ The court issued a permanent injunction and dismissal of the action, thereby forbidding Hammernick from repeating her solicitous conduct. Order for Permanent Injunction and Dismissal of Action at 8, *TEKsystems, Inc., v. Hammernick*, No. 0:10-cv-00819-PJS-SRN (D. Minn. Oct. 18, 2010), ECF No. 20 (granting a stipulation for permanent injunction and dismissal of action). Additionally, the parties effected a private settlement. *See id.* at 7.

⁹⁶ Sarah L. Hinkle, *Social Networking Sites Can Expose Weaknesses in Noncompete Agreements*, EMP’T ESSENTIALS: LAB. & EMP’T L. BLOG (June 21, 2010), <http://www.sjlaboremploymentblog.com/social-networking-sites-can-expose-weaknesses-in-noncompete-agreements/>.

⁹⁷ *Id.*

as to whether explicit reference to social media is required to restrict solicitation via such fora. That said, to avoid even having to litigate the issue, it may be prudent for employers to err on the side of caution and include such explicit reference regardless.

B. Social Media Activity as Evidence of Violations of Restrictive Covenants

Although no other cases have alleged that social media activity constitutes a violation of a restrictive covenant, courts have been willing to use such activity as *evidence* of a violation, blurring the distinctions between social media communication and traditional communication. In *Kelly Services, Inc. v. Marzullo*, for example, Kelly alleged that its former employee, Marzullo, had violated his non-compete covenant by taking a job with Kelly's competitor.⁹⁸ Marzullo's agreement covered the state of Texas, and Kelly discovered that Marzullo was working for a competitor in the Dallas area and was responsible for the competitor's Dallas territory.⁹⁹ The only evidence cited by the court in regards to Kelly's findings was information posted on Marzullo's LinkedIn profile commenting on his new position.¹⁰⁰ None of Marzullo's profile content was alleged to have *itself* violated the non-compete agreement.¹⁰¹ However, the court readily relied on the information posted on a professional networking website as *evidence* of conduct which did violate the non-compete agreement, namely, working for a competitor in the same geographical area.¹⁰² Thus, evidence of restrictive covenant breach can be valid whether it comes from contact via social media, an e-mail correspondence, or a notarized letter.¹⁰³ This

⁹⁸ 591 F. Supp. 2d 924, 929–30 (E.D. Mich. 2008).

⁹⁹ *Id.* at 931.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 939; *see also* Iron Mountain Info. Mgmt. Inc. v. Viewpointe Archive Servs., LLC, 707 F. Supp. 2d 92, 113 (D. Mass. 2010) (citing information obtained from defendant's Facebook profile page as evidence warranting a preliminary injunction barring defendant from soliciting the customers of his former employer and from attempting to recruit his former colleagues).

¹⁰³ Because of the sheer amount of information shared and transferred via social media, it is hardly surprising that users' activity histories are frequently required for various forms of civil lawsuits. The three social media outlets focused on in this Note provide information on their policies for the disclosure of user-history information in regards to lawsuits. The Stored Communications Act, 18 U.S.C. §§ 2701–2712 (2006), prohibits social media outlets from disclosing the contents of an account to non-governmental entities pursuant to a subpoena or court order. *See, e.g.,* Flagg v. City of Detroit, 252 F.R.D. 346 (E.D. Mich. 2008); *In re* Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 609–10 (E.D. Va. 2008); FTC v. Netscape Commc'ns Corp., 196 F.R.D. 559, 559, 561 (N.D. Cal. 2000). However, social media users who are parties to lawsuits may themselves obtain access to their social media account history, and in turn be compelled through discovery to produce them to adverse parties. James Parton, *Obtaining Records from Facebook, LinkedIn, Google and Other Social Networking Websites and Internets Service Providers*, FOR THE DEFENSE, 4

suggests that social media will not be relegated to its own body of law, but rather will simply be incorporated into the framework of existing restrictive covenant law. In effect, then, the medium seems to matter little.¹⁰⁴ The focus remains on the sentiment. This adds credence to the expectation that social media will not force courts to carve out distinctions in the existing body of law governing restrictive covenants in employment contracts. Rather, existing principles will simply be applied to social media conduct. However, insofar as social media facilitates *modes* of communication not yet dealt with by the courts, a firm understanding of the functionality of these novel modes of communication provides the platform necessary to predict how the courts will apply existing principles to social media conduct.

C. Merely "Connecting" with, "Friending," or "Following" a Restricted Party Via a Social Media Outlet

Social media can be used to solicit restricted parties, as can any form of communication. However, social media can also be utilized for an enumerable amount of purposes other than such solicitation.¹⁰⁵ Therefore, a former employee subject to restrictive covenants may pause before cementing a connection with a former colleague or client on a social media website. The issue may turn on which party initiated the relationship. Extrapolating from the rules discussed in Part II above, a former employee who was sought out, whose "connection" or "friendship" was requested by a restricted party, would be unlikely to violate a non-solicitation agreement by accepting such a request.¹⁰⁶ Similarly, a former employee is unlikely to be said to have "approached" a

(May 24, 2010, 9:40 AM), <http://dritoday.org/post/Obtaining-Records-From-Facebook-LinkedIn-Google-and-Other-Social-Networking-Websites-and-Internet-Service-Providers.aspx>. Facebook provides mechanisms for users to produce and authenticate contents of their accounts in order to satisfy discovery requirements pursuant to civil litigation. *Law Enforcement and Third-Party Matters*, FACEBOOK, <http://www.facebook.com/help/?page=211462112226850> (last visited Nov. 6, 2011). Facebook will also, to the extent possible, restore access to account information from disabled or deleted accounts to enable a user to collect and produce the account's content. *Id.* Similarly, LinkedIn provides that it may "disclose personal information, profile information and/or information about [user] activities . . . when required by subpoena or other legal process." *Privacy Policy*, LINKEDIN, http://www.linkedin.com/static?key=privacy_policy&trk=hb_ft_priv (last visited Nov. 6, 2011). Twitter provides that it may disclose user information if "it is reasonably necessary to comply with a law, regulation, or legal request." *Twitter Privacy Policy*, TWITTER, <http://twitter.com/privacy> (last visited Nov. 6, 2011).

¹⁰⁴ See Del Rossi & Rinschler, *supra* note 9, at 5 ("The medium through which an employee chooses to unlawfully solicit should not make a difference.").

¹⁰⁵ The threat of solicitation may be higher for connections on professional networking sites such as LinkedIn, as opposed to Facebook, which instead has a more social and informal framework. That said, both remain potential platforms for both offensive and inoffensive communications. See *supra* Part III.A–B.

¹⁰⁶ This is because a former employee does not engage in solicitation when he is approached by a restricted party. See *supra* note 29 and accompanying text.

Twitter user who undertakes the action of signing up to “follow” the employee’s Twitter account.¹⁰⁷ What about the former employee, however, who is the one doing the requesting, sending out “connection” or “friendship” invitations to former colleagues and clients?

The answer to this question is likely to resolve itself in the innocuous nature of merely establishing a connection via social media. While establishing connections with former colleagues and clients may cause concern that a non-solicitation agreement *will be* violated, the connection *itself* does not take the form of a solicitation.¹⁰⁸ A connection between two individuals on a social media site merely creates a forum for contact, contact that can take many shapes, offensive or otherwise. Agreements that prohibit the solicitation of certain groups do not thereby prohibit all contact with those groups.¹⁰⁹ As was discussed in Part II, restrictive covenants will not be enforced where they are overbroad, that is, where they afford the employer more protection than is necessary to protect its legitimate business interests.¹¹⁰

An employer wary of social media relationships between former employees, current employees, and clients may seek to restrict the former employee’s ability to even establish such a relationship in the first place. This could be accomplished via a no-contact provision in the employment contract, as a social media connection is likely a form of contact. However, such a no-contact provision may well be unnecessary to protect the employer’s legitimate business interest, and therefore unenforceable.¹¹¹ A clause prohibiting all contact via social media may not only be protective of the employer’s interests, but also be overinclusive, prohibiting a plethora of harmless exchanges.

Mathias v. Jacobs is illustrative of the pernicious effects of a non-compete agreement prohibiting all forms of contact.¹¹² In *Mathias*, the plaintiff-employee, pursuant to his non-compete agreement, agreed not to “have any contact whatsoever with” current or prospective business partners of his employer, employees or their families, and any company that was an acquisition target of the employer.¹¹³ The court acknowledged that the no-contact clause

¹⁰⁷ *Id.*

¹⁰⁸ In some states, even the act of actually hiring a restricted party will not be deemed to sufficiently constitute conduct violative of a covenant aiming to prohibit proscribable employee solicitation. See Vanko, *supra* note 11, at 7–8 (“Some states will even void an employee non-solicitation covenant that bars the mere hiring of an employee, as opposed to more active, aggressive efforts to recruit away key talent.”).

¹⁰⁹ See *Advantage Digital Sys., Inc. v. Digital Imaging Servs., Inc.*, 870 So. 2d 111, 114–15 (Fla. Dist. Ct. App. 2003) (holding that an injunction prohibiting contact with former customers is beyond the scope of a covenant prohibiting only solicitation); *Hunter Grp., Inc. v. Smith*, 9 F. App’x 215, 219 (4th Cir. 2001) (“[W]hatever may be the outer limits of a reasonable interpretation of ‘solicit,’ . . . it is clear that the term does not encompass *mere contact* between an ex-employee and her former colleagues . . .” (emphasis added)).

¹¹⁰ See *supra* notes 12–15 and accompanying text.

¹¹¹ See *supra* notes 24–25 and accompanying text.

¹¹² 167 F. Supp. 2d 606 (S.D.N.Y. 2001).

¹¹³ *Id.* at 610.

was tempered by a time limitation but noted that it was also “conspicuously devoid of . . . subject matter.”¹¹⁴ Ultimately, the court held that the no-contact clause was not in pursuit of a legitimate business interest of the employer, that it precluded Mathias from contacts that were wholly innocuous, such as social contacts, and that it was therefore unenforceable.¹¹⁵ Thus an employer may be unable to prevent employees from establishing social media connections with restricted parties.¹¹⁶ Nonetheless, solicitation conducted through such connections, once established, is just as violative of non-solicitation agreements as solicitation conducted through traditional channels.¹¹⁷

D. Does Compliance with Non-Solicitation Covenants Require Former Employees to Remove Connections or “Un-Friend” Former Clients and Colleagues Until the Restrictive Period Ends?

The factors relevant to this issue have largely been discussed above, as the questions presented by subparts C and D are substantially related. To the extent that they differ, refusal to sever existing social media connections with restricted parties is even less likely to violate a non-solicitation agreement. While the previous issue dealt with social media connections established *after* employment has ended, this issue is focused on the fate of social media connections forged during, or prior to, employment. Connections established during employment, and maintained thereafter, may threaten employers less than connections created only after employment has been terminated. On its face, the mere continuance of an existing social media relationship is less threatening to employers’ interests than a relationship which represents the *first* contact between a former employee and a member of a restricted class. Further, many employers train and encourage their employees to develop social media relationships with their clients and colleagues in order to inculcate customer loyalty, increase exposure, promote marketing, or to achieve one of many other possible benefits.¹¹⁸

¹¹⁴ *Id.* at 612.

¹¹⁵ *Id.*

¹¹⁶ While it is thus unlikely that an employer can prohibit a former employee from mere “friending” or “connecting with” a restricted party, it is even *less* likely that “following” a restricted party on Twitter can be proscribed. This is because unlike “friending” or “connecting” (i.e., on Facebook and LinkedIn respectively) “following” a restricted party on Twitter is a gateway to a purely passive form of contact: the follower simply *receives* information, and cannot thereby solicit. See Kaplan & Haenlein, *supra* note 70, at 107.

¹¹⁷ See *supra* note 104 and accompanying text.

¹¹⁸ See, e.g., Furia Rubel, *supra* note 38, at 47 (extolling ability of social media to provide attorneys with boundless opportunities for strategic online marketing and public relations exposure and recommending employer embrace of employee social media use); Gouckenour, *supra* note 34, at 10 (“Social networking sites are useful marketing . . . tools . . .”); Rosenberg, *supra* note 2, at 17, 34 (“[B]usinesses can . . . benefit from their employees’ use of social networking Websites to connect and maintain relationships with new and existing colleagues, business partners, and clients. . . . [Some

Personal relationships between employees and their clients and colleagues often transcend the duration of employment. They may emerge out of the employee-client or colleague-colleague relationship but they are not bound by it. Therefore, it would seem unnecessary for an employer to demand that an employee who had given expression to a relationship with a restricted party via social media sever all social media ties with that party.¹¹⁹ Moreover, both the former employee and his former colleague or customer have an interest in preserving an otherwise healthy social media relationship.¹²⁰ These interests weigh against the employer's interests for a court utilizing the balancing approach discussed in Part II to determine the enforceability of a restrictive covenant.¹²¹ At bottom, it may be difficult for an employer to contend that the severance of *personal* social media ties is reasonably necessary to protect a legitimate *business* interest, as required.

E. *What Is the Effect of Information Posted on a Former Employee's Social Media Page?*

TEKsystems, Inc. v. Hammernick addressed a message sent via social media from a former employee to an existing employee. As aforementioned, it would seem that the contents of this message will be judged just as they would had the same message been conveyed through an e-mail or formal letter. But what about a posting on a former employee's social media page or profile, visible by all of his connections or friends, whether or not they are former colleagues and customers?

As with all correspondence alleged to be violative of a non-solicitation clause, the content and purpose of the message are of paramount importance. A large amount of information may be viewable by restricted parties on a former employee's social media page and yet not be violative of a non-solicitation agreement. For example, existing case law suggests that an employee updating his profile or "tweeting" to inform his friends, connections, or followers of a potential career move would not be violating his non-solicitation agreement.¹²²

employers] actively encourage employees to maintain online connections that may lead to new business."); Hinkle, *supra* note 96 ("Many employers, particularly those in sales or recruiting, encourage their employees to create profiles on sites such as LinkedIn, and many employees depend upon those sites for much of their work product. . . . [T]hose sites can create tremendous benefits for employers and employees . . .").

¹¹⁹ This is the fatal note for employers, as non-solicitation provisions will be upheld only to the extent they are *necessary* to serve the employer's legitimate business interests. See *supra* note 24 and accompanying text; see also Vanko, *supra* note 11, at 7 (noting that non-solicitation clauses will be upheld only when tailored to protect an employer's business interest).

¹²⁰ See *supra* notes 19–20 and accompanying text.

¹²¹ See *supra* note 15 and accompanying text.

¹²² See *Cintas Corp. v. Perry*, 517 F.3d 459, 467–68 (7th Cir. 2008) (holding that a former employee's conversations with colleagues and customers regarding a potential career

However, the issue is transformed if the employee publishes a message on his profile or page that would concededly violate a non-solicitation clause if that same message was sent to a former colleague or client through traditional channels. The outcome of such a situation is highly fact sensitive, shifting with the way in which the information is shared on the given social media outlet.

The Facebook news feed, for example, updates users when their friends update their profiles or pages by publishing new information.¹²³ Similarly, LinkedIn informs users of updates to their connections' profiles upon login¹²⁴ and following a user's Twitter account allows other users to be informed each time that user tweets.¹²⁵ These forms of communication can result in a user's information being automatically published to his friends, connections, or followers merely by virtue of their logging into the social media site. All three sites, however, also provide for more passive methods of communication. If a user publishes new information to his Facebook or LinkedIn profile, or posts a tweet, other users desirous of viewing this information may themselves actively search for that user's social media profile to view the information.¹²⁶ The distinction between the active and passive forms of sharing information thus has implications for the question of "Who approached whom?" As previously discussed, the sharing of information by a former employee does not equate to solicitation if the information was sought out by a former colleague or client, as opposed to given to those parties by the former employee.¹²⁷

In a situation where a former employee publishes information on his profile or Twitter page, it could be argued that he has, in effect, sent that message out to all of his connections on the given social media site, thereby breaching his non-solicitation agreement. If, for example, a Twitter user publishes a tweet indicating that he "loves his new job and wishes his former colleagues at Company X would see the light and change companies," he does so with the knowledge that all those who "follow" him on Twitter will be informed of the tweet the moment they log in to the site. He can thereby be said to have sent the tweet to all of his followers. If his followers include members from a restricted class, e.g., former colleagues, he is likely to have violated his non-solicitation agreement. If, however, the former employee boasts no Twitter followers who are members of the restricted class, then those individuals would have to actively search for that former employee in order to view the tweet. In this latter context, the members of the restricted class would be doing the approaching. The former employee is unlikely to have violated his non-solicitation agreement in this scenario.

move to a competitor did not constitute solicitation violative of employee's restrictive covenants).

¹²³ See *supra* Part III.A.

¹²⁴ See *supra* Part III.B.

¹²⁵ See *supra* Part III.C.

¹²⁶ See *supra* Part III.A–C.

¹²⁷ See *supra* note 17 and accompanying text.

Similarly, a LinkedIn user updating his profile with an otherwise solicitous status or other update does so with the knowledge that his connections will be informed of such update upon log in.¹²⁸ He can thereby be said to have communicated the solicitous information to his connections. Thus, if his connections include restricted parties, he is likely to have violated his non-solicitation agreement by updating his profile with solicitous information, effectively pushing that information to restricted parties. If, however, the former employee takes advantage of LinkedIn's privacy settings,¹²⁹ he can restrict the class of connections receiving automatic updates to exclude any connections who are also restricted parties. This enables the user to publish solicitous material to his LinkedIn profile without the attendant risk that such information will be automatically communicated to restricted parties upon login. Since any restricted-party connections would then be forced to seek out the former employee's profile in order to view the otherwise solicitous update, the former employee cannot be said to have violated his non-solicitation agreement.

This discussion becomes more complex still if the site in question is Facebook. This is due to the Facebook news feed powered by EdgeRank outlined above in Part III.¹³⁰ Consider a former employee posting information on his Facebook profile that *would* be deemed solicitation if communicated by him to a restricted party. The former employee publishes this information with the knowledge that it will be distributed to numerous friends, but not all friends, the moment they sign on to Facebook. Most perplexing of all, the former employee cannot know which among his friends will have the information appear on their news feeds, and which among them would have to search for the former employee's profile in order to view it.¹³¹ Thus a former employee who is friends with members of a restricted class publishes information on his profile with the attendant risk that such information *may* be viewable by restricted parties upon login. While the uncertainty present likely prevents such publications from being classified as *direct* solicitation, the former employee *is* likely to have engaged in *indirect* solicitation in violation of his non-solicitation agreement.

Former employees are unlikely to engage in *direct* solicitation by publishing otherwise offensive information on their Facebook profiles. Direct solicitation has been defined as concentrated marketing directed at a "discrete number of identifiable individuals" already part of the restricted class (i.e., former colleague or clients).¹³² Thus, information communicated to friends both inside and outside of the restricted class via their news feeds does not constitute direct solicitation. Nonetheless, a former employee may very well engage in *indirect* solicitation by publishing otherwise offensive information on his

¹²⁸ See *supra* notes 65–66 and accompanying text.

¹²⁹ See *supra* notes 67–69 and accompanying text.

¹³⁰ See *supra* pp. 888–889.

¹³¹ See *supra* pp. 888–889.

¹³² *Harris v. Univ. Hosps. of Cleveland*, No. 76724, 2002 WL 363593, at *7 n.23 (Ohio Ct. App. Mar. 7, 2002).

profile. Indirect solicitation has been defined as “bulk advertisement designed to be seen by a substantial number of persons” whether or not they are part of the restricted class.¹³³ A former employee utilizing his Facebook profile as a forum to tout his new position or company to former customers and colleagues may thus very well be engaging in indirect solicitation.¹³⁴ Therefore, an employer seeking to restrict its former employees from using social media to lure away its customers or employees may effectively do so by prohibiting indirect solicitation. The distinction¹³⁵ between direct and indirect solicitation may seem trivial, but the potential ramifications for employers loom large. A non-solicitation provision will only protect an employer from indirect solicitation if it is explicitly prohibited in the employment contract or a stand-alone non-solicitation agreement.¹³⁶ Thus a comprehensive non-solicitation provision must address *both* direct and indirect solicitation.¹³⁷

The possible fact patterns defy enumeration and the perplexing questions posed by such scenarios have yet to be taken up by American courts. Thus, a clear resolution of these complex questions may have to await future litigation. Nonetheless, the foregoing Part utilized analogies to existing law to discern the likely place that social media’s novel forms of communication will take in restrictive covenant law. What is left is to assess the responsibilities and best

¹³³ *Id.*

¹³⁴ Given the inherent uncertainty in which a user’s friends will receive updates on their respective news feeds, a former employee using Facebook would be well advised to take advantage of the privacy settings outlined above in *supra* notes 41, 55 and accompanying text. Through this process, the former employee can tailor his updates to ensure that potentially offensive updates do not appear on the news feeds of restricted parties. Further, he can ensure that potentially offensive updates are not even viewable by restricted parties who themselves actively search out the former employee’s profile. This is undoubtedly the best method to protect a former employee from violating his restrictive covenant via Facebook.

¹³⁵ It is worth noting that the definitions of direct and indirect solicitation here utilized are not the only definitions of these terms. In certain contexts, the distinction turns on the goal or nature of a given contact between a former employee and a restricted party. That is, only one form of contact is at issue, but such contact may be labeled directly solicitous, indirectly solicitous, or non-solicitous, depending on the subject-matter and scope of such contact. *See, e.g.,* KMPG Peat Marwick LLP v. Fernandez, 709 A.2d 1160, 1164 (Del. Ch. 1998) (noting that professional or social contact between a bound entity and a restricted party does not constitute indirect solicitation by virtue of the contact alone, “although such contact may have as its ultimate goal the establishment of a working relationship”). Still another formulation of the direct and indirect distinction turns on whether a covenanted former employee solicits a restricted party himself (direct solicitation), or instead engages an intermediary to perform such solicitation (indirect solicitation). *See, e.g.,* Greene v. Grievance Comm. for the Ninth Judicial Dist., 429 N.E.2d 390, 393 (N.Y. 1981) (noting that direct solicitation of an intermediary to refer restricted parties to the solicitor constitutes indirect solicitation of the restricted parties by the solicitor).

¹³⁶ *See* Vanko, *supra* note 11, at 7 (“[Non-solicitation agreements] are still strictly construed against the drafting party and will not preclude a party from hiring a competitor’s employees if such passive solicitation is not *expressly* prohibited.” (emphasis added)).

¹³⁷ *See supra* note 12.

courses of action for employees and employers respectively bound and protected by restricted covenants in view of the conclusions reached in Part IV. Part V first summarizes these conclusions. Then, an employee focus on privacy and an employer focus on comprehensive social media policies is advocated. Ultimately, with a firm understanding of the ways in which information flows across social media channels, all parties involved will be able to structure their conduct to adhere to existing restricting covenants in the social media age.

V. GOING FORWARD: ADVICE FOR EMPLOYEES AND EMPLOYERS IN THE SOCIAL MEDIA AGE

As was discussed in Part IV, employees bound by non-solicitation agreements need not sever all social media ties with restricted parties upon departing from their employment.¹³⁸ Further, former employees do not violate non-solicitation agreements by merely establishing or continuing social media relationships with restricted parties.¹³⁹ Nonetheless, if a social media relationship is maintained or established with a restricted party post-employment, that relationship provides a forum for offensive, along with inoffensive, communication between former employees and restricted parties.¹⁴⁰ For Twitter and LinkedIn users, a tweet or profile posting containing solicitous information is likely to violate a non-solicitation provision if the former-employee user counts restricted parties among his followers or connections.¹⁴¹ Finally, for Facebook users, a profile posting containing solicitous information is likely to constitute at least *indirect* solicitation if the former-employee user counts restricted parties among his friends.¹⁴²

A. Advice for Employees

Former employees seeking to maintain social media connections with restricted parties post-employment would be well advised to utilize the privacy settings on the given social media site to ensure that solicitous information is not communicated to restricted parties. Privacy settings allow social media users to exert control over which of their social media connections will have access to given pools of information.¹⁴³ However, full implementation of

¹³⁸ See *supra* Part IV.D.

¹³⁹ See *supra* Part IV.C.

¹⁴⁰ See *supra* notes 104, 117 and accompanying text.

¹⁴¹ See *supra* pp. 898–99.

¹⁴² See *supra* pp. 898–99.

¹⁴³ Stutzman & Hartzog, *supra* note 7, at 3. Frederic Stutzman and Woodrow Hartzog undertake a fascinating analysis of how social media users can employ “boundary regulation” to control the information communicated to various segregated groups via social media sites. *Id.* “Users are challenged to balance the composition and volume of their disclosures to . . . heterogeneous groups [i.e., restricted and non-restricted parties]. To

privacy settings is not the only tool at a former employee's disposal where he seeks to avoid conduct violative of his non-solicitation agreement.

Stutzman and Hartzog identify three separate methods by which a social media user can tailor his online presence to communicate specific information only to desired groups. First, a social media user can create more than one profile on a given social media site.¹⁴⁴ For example, a former employee might create two Facebook profiles. One of the profiles can then be used to friend restricted parties, the other to friend purely social acquaintances. The former employee can then publish solicitous information only on the latter profile with the knowledge that restricted parties will not be able to access it. Second, privacy settings can be utilized to present different persona to multiple audiences.¹⁴⁵ Such utilization of privacy settings has been advocated throughout this Note. By denying restricted parties access to certain information, or to updates in general, a former employee can publish solicitous information on a given social media account with little fear that such information will be communicated to a restricted party. Third, heterogeneous audiences can be segmented by social media site. Thus, a former employee may maintain social relationships with acquaintances via Facebook and professional relationships with restricted parties via LinkedIn. Once such segmentation has been effected, a former employee may then publish solicitous information only on his Facebook profile with little fear that such information will reach his restricted party connections on LinkedIn.

Thus, through sophisticated use of privacy settings and multiple social media profiles and accounts, a former employee can do much to maintain social media relationships with restricted parties while satisfying his non-solicitation provision. Nevertheless, the only way to prevent even the possibility of solicitation of restricted parties is to sever social media ties with restricted parties. This is because a misuse of privacy settings may lead to accidental solicitation, and evidence of such solicitation will remain on the Internet despite the former employee's best efforts to erase it.¹⁴⁶

B. *Advice for Employers*

Employers seeking to enforce restrictive covenants even as their former employees maintain social media relationships with restricted parties are subject

address these challenges, users of social media might self-censor, limit group access, or utilize technical controls such as privacy settings and access control lists." *Id.*

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.*

¹⁴⁶ "Generally, social network users should assume everything posted is public. This assumption should be made even if a user has enacted the most restrictive privacy settings available." Gouckenour, *supra* note 34, at 9. "Anything that was once searched and captured by Google will live on as a cached link. Google runs searches on its own; an individual does not have to search for information in order for Google to capture that information. More interesting still: Google's archived information is searchable." *Id.*

to what might be called the “privacy paradox”: employee utilization of social media privacy tools can prevent solicitation of restricted parties, however, it can also protect *intentional* solicitation from detection by employers. A former employee can restrict the access of his former employer to his social media conduct just as readily as he can restrict the access of restricted parties.¹⁴⁷ Thus, privacy settings embody both the best tool for protection of an employer’s interests and the best tool for circumventing such protections by affecting clandestine solicitation of restricted parties. An employer can of course obtain ready access to any *public* information on social media sites, but is prevented from accessing private information by the Stored Communications Act.¹⁴⁸ Thus, for many employers, the best, indeed the only, course of action is to enact a detailed social media policy, explaining to employees the ways in which they are bound by their restrictive covenants.¹⁴⁹ For many employers, this process

¹⁴⁷ It is not impossible for employers to monitor an employee’s social media conduct. In fact, such monitoring has led to the emerging phenomenon of “doocing.” See Stephen D. Lichtenstein & Jonathan J. Darrow, *Employment Termination for Employee Blogging: Number One Tech Trend for 2005 and Beyond, or a Recipe for Getting Dooced?*, 2006 UCLA J.L. & TECH. 4, ¶ 6. Doocing is defined as “an employer firing an employee for the employee’s internet posts [and it] is increasingly common as the blogosphere expands.” Joseph Lipps, Note, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 647–48 (2011) (citing *BuzzWord*, MACMILLAN ENGLISH DICTIONARY, <http://www.macmillandictionary.com/buzzword/entries/dooced.html> (last visited Nov. 6, 2011)); see also Gouckenour, *supra* note 34, at 8–9 (describing various employees who were dooced because of social media postings). Blogger Heather Armstrong coined the phrase in 2002 upon being terminated from her Web design job for comments posted on her blog, Dooce.com. Amy Joyce, *Free Expression Can Be Costly When Bloggers Bad-Mouth Jobs*, WASH. POST, Feb. 11, 2005, at A17. Indeed, many employers restrict employees’ access (total block or electronic monitoring) to social media sites *while at work*. Rosenberg, *supra* note 2, at 18. Such monitoring is much more difficult, however, in the context of enforcing non-solicitation agreements where the bound party is a former employee. “When employees engage in social networking on their own time and with their own resources, it becomes much more difficult to monitor or control online activities that may create risk for the company.” *Id.*

¹⁴⁸ 18 U.S.C. §§ 2701–2712 (2006). “[W]hoever (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished . . .” *Id.* § 2701(a). Furthermore, “a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.” *Id.* § 2702(a)(1).

¹⁴⁹ Furia Rubel, *supra* note 38, at 49 (encouraging law firms to develop social media policies); Rosenberg, *supra* note 2, at 34 (“[A] clear and specific social networking policy can be of tremendous assistance in guiding the company toward an appropriate resolution while minimizing the risk of creating an erroneous perception that the employer is interested in invading its employee’s privacy rights.”).

may be as simple as supplementing existing policies that address social media use in other areas.¹⁵⁰

The goal of any social media policy should be to encourage employees to use common sense and privacy controls when maintaining social media relationships with restricted parties.¹⁵¹ While the following tips are not exhaustive, implementation of a policy featuring them will do much to protect employers from violations of the non-solicitation agreements that bind their former employees.

1. Advise employees that disclosure of confidential information on social networking sites is prohibited.¹⁵²
2. Explicitly reference social media in any restrictive covenant prohibiting contact between former employees and former colleagues, clients, or customers.
3. Take reasonable steps to protect client data. An employer may threaten the reasonableness of its non-compete or non-solicitation clause by encouraging or facilitating the employees' use of social media to connect with clients without taking steps to control such connections.¹⁵³
4. At the exit interview, inquire into employee's social media activities. If colleague or customer connections have been created, outline the forms of contact prohibited by the restrictive covenant.¹⁵⁴
5. Inform employees that they are responsible for everything they post on social media sites, whether the information appears on their profile or someone else's.¹⁵⁵
6. Inform employees that they are responsible for ensuring that their social media activities do not violate a restrictive covenant.¹⁵⁶

VI. CONCLUSION

Future litigation may do much to aid employers in identifying the best method for addressing social media in employment contracts. In the interim, questions remain regarding the extent to which social media activity can be restricted by employment contracts as well as the type of social media activity that will breach such restrictions once created. This Note represents an effort to clarify the most perplexing questions posed by social media communication vis-

¹⁵⁰ See generally Ethan Zelizer, *Ten Rules for a Social Media Policy: Embracing and Controlling Social Media in the Workplace*, CBA REC., Oct. 2010, at 52 (highlighting the need for social media policies for employers, irrespective of restrictive covenants, to inform employers about their duties not to disparage their employer via social media communication).

¹⁵¹ Rosenberg, *supra* note 2, at 18–19.

¹⁵² Del Rossi & Rinschler, *supra* note 9, at 3.

¹⁵³ *Id.* at 3–4.

¹⁵⁴ *Id.* at 4.

¹⁵⁵ Rosenberg, *supra* note 2, at 19.

¹⁵⁶ *Id.*

à-vis restrictive covenants. Because the principles behind restrictive covenants are threatened by social media activity and traditional media activity alike, existing restrictive covenant law may shed light on possible answers to these questions. Prohibiting former employees from creating or maintaining social media connections with former colleagues or employees may be beyond the scope of activity permissibly regulated by restrictive covenants. Nevertheless, activity on social media sites is no safe haven for would-be violators of restrictive covenants; it is reasonable to expect that the medium will not change the legal outcome. Finally, employers do not have to wait for answers to the questions raised above. By informing employees of the repercussions of their social media activities, they can continue to utilize restrictive covenants to protect their business interests even as employees increasingly utilize social media to connect with clients and colleagues.